

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

77-1079-77-7075

To be argued by
DAVID RAPAPORT

United States Court of Appeals

For the Second Circuit

F. X. MALTZ, LTD.,

Plaintiff-Appellant.

against

ROBERT MORGENTHAU, Individually and as District
Attorney of the County of New York, and MICHAEL
CODD, Individually and as Police Commissioner of the
City of New York.

Defendants-Appellees.

Appeal from a Judgment of the United States District
Court for the Southern District of New York Dismissing
the Plaintiff's Complaint and Denying Plaintiff's Motion
for Summary Judgment

BRIEF FOR APPELLEE MORGENTHAU

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Appellee Morgenthau
155 Leonard Street
New York, New York 10013
(212) 732-7300

PETER L. ZIMROTH
DAVID RAPAPORT
Assistant District Attorneys

ROBERT M. GROSS
Criminal Law Investigator
Of Counsel



TABLE OF CONTENTS

	Page
Questions Presented.....	1
Statement Of The Case.....	2
Preliminary Statement.....	2
Statement Of Facts.....	3
Point I - Plaintiff has failed to state a claim upon which relief can be granted because plaintiff has failed to establish the existence of a "case" or "controversy."	5
Conclusion.....	9
Appendix.....	10

T A B L E O F C A S E S

	Page
<u>Aetna Life Insurance Co. v. Haworth et al.</u> 300 U.S. 227 (1937).....	5
<u>Atwood v. Purcell</u> , 402 F. Supp. 231 (D. Ariz. 1975)...	7,8
<u>Boyle v. Landry</u> , 401 U.S. 77 (1971).....	5,6
<u>California v. LaRue</u> , 409 U.S. 109 (1972).....	7,8
<u>Doran v. Salem Inn Inc.</u> , 422 U.S. 922 (1975).....	7
<u>Evans v. Lynn</u> , 537 F. 2d 571 (2nd Cir. 1975).....	6
<u>Felix v. Young</u> , 536 F. 2d 1126 (6th Cir. 1976).....	7
<u>Golden v. Zwickler</u> , 394 U.S. 103 (1969).....	6
<u>Marcus v. Search Warrants</u> , 367 U.S. 717 (1961).....	7
<u>Miller v. California</u> , 413 U.S. 15 (1975).....	8
<u>O'Shea v. Littleton</u> , 414 U.S. 488 (1974).....	6
<u>People v. Morgan</u> , 382 N.Y.S. 2d 666 (Criminal Court, New York City (1976)).....	8
<u>Rizzo v. Goode</u> , 423 U.S. 362 (1976).....	6
<u>Salem Inn v. Frank</u> , 522 F. 2d 1045 (2nd Cir. 1975).....	7
<u>Steffel v. Thompson</u> , 415 U.S. 452 (1974).....	7
<u>206 East 52nd Rest. Corp. v. City of New York</u> , 384 N.Y.S. 2d 654 (Supreme Court, New York County, Special Term, Part I (1976)).....	8
<u>United States ex rel. Gonzalez v. Follette</u> , 397 F. 2d 232 (2nd Cir. 1968).....	6
<u>Walter Service Co. v. Redding</u> , 304 U.S. 252 (1938).....	6
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1963).....	6

S T A T U T E S

New York Penal Law Section 235.....	Appendix
New York Criminal Procedure Law Section 140.10...	Appendix

UNITED STATES COURT OF APPEALS
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Plaintiff-Appellant

-against-

ROBERT MORGENTHAU, Individually and as
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Defendants-Appellees

Docket No.
77-7075

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Appeal from a Judgment of the United States
District Court for the Southern District of
New York Dismissing the Plaintiff's Complaint
and Denying Plaintiff's Motion for Summary
Judgment

BRIEF FOR APPELLEE MORGENTHAU

Questions Presented

1. Whether the District Court was correct in granting
defendants' motion to dismiss the complaint for failure to state a
claim upon which relief can be granted.

2. Whether the District Court was correct in denying
plaintiff's motion for summary judgment.

STATEMENT OF THE CASE

(A) Preliminary Statement

Plaintiff appeals from a judgment of the United States District Court for the Southern District of New York (Wyatt, J.) entered on January 26, 1977 granting defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted, and denying plaintiff's motion for summary judgment.

Plaintiff filed its complaint on December 6, 1976, and obtained an order to show cause why a preliminary injunction and a declaratory judgment should not issue, returnable December 10. The hearing was adjourned to December 13, at which time plaintiff withdrew its request for preliminary relief. Defendants informed the Court that they would move to dismiss the complaint, and a hearing was set for January 24, 1977.

Memoranda of law were submitted by counsel, and on January 24, the Court granted defendants' motion to dismiss the complaint pursuant to F.R.C.P. 12 (b) (6). During the argument, plaintiff made an oral motion for summary judgment, which was denied. Defendants objected to plaintiff's failure to comply with the notice requirements of F.R.C.P. 56.

Plaintiff filed its Notice of Appeal on February 9, 1977, and moved this Court for an order granting a preference and setting an expedited hearing date for the appeal. On February 22, the Court ordered the appeal expedited, and set argument for

the week of March 28, 1977. A conference with Staff Counsel was held on March 3, 1977.

(B) Statement Of Facts

According to the complaint, Plaintiff F.X. Maltz, Ltd. is a New York corporation which leases and operates a motion picture theater located at 124 West 43rd Street, in Manhattan. Plaintiff exhibits "sexually oriented feature length motion pictures." (§1).

Plaintiff alleges that: "Live dance performances by to-tall partially clothed dancers are and have been regularly performed in theatres in midtown Manhattan as part of a total entertainment package including sexually oriented motion pictures." (§4). During September, October, and November 1976, New York City police officers have entered these theaters and arrested the dancers in mid-performance, without a warrant or prior judicial scrutiny. (§5).

Plaintiff would like to offer the patrons of its "sexually oriented" movies live dance performances which it predicts "will involve non-obscene topless and even nude choreographed performances by male and female dancers..." (§§2-3). However, "[P]laintiff's exercise of its First Amendment right to produce theatrical shows encompassing such live dance entertainment has likewise been chilled by the unlawful arrests, prior restraints and prosecutions under the statute, inhibiting plaintiff and impeding the consummation of plaintiff's desire to offer live dance entertainment in its theatre." (§9)

"By reason of the enforcement of the statute as aforesaid and the implicit threat of the enforcement of the statute against plaintiff, plaintiff has failed to offer live nude or partially nude dancing in its premises" (§11).

Plaintiff complains that: "As a result of the aforesaid threats of prosecution and the resultant refusal of Plaintiff or its dancers to offer the patrons of Plaintiff nude dancing performances, Plaintiff is placed at a competitive disadvantage viz a viz other theatres in the area which are willing to undertake the rigors of criminal prosecution. Plaintiff cannot long continue in business with its patrons who desire to see nude dancing traveling the few blocks to nearby theatres where such dancing entertainment is offered." (§§16-17).

Plaintiff argues that it is unconstitutional for the police to arrest nude dancers in mid-performance. Plaintiff's attack is directed not at the New York obscenity statute (Penal Law Section 235) but rather at Criminal Procedure Law Section 140.10, which authorizes a police officer to arrest a person for an offense when "he has reasonable cause to believe that such person has committed such offense in his presence." Plaintiff seeks a declaratory judgment that Section 140.10 is unconstitutional, and an injunction prohibiting any arrest pursuant to this statute absent "obtaining a warrant from a judicial officer who has viewed the performance and determined the obscenity vel non thereof." (prayer 3).

POINT I

PLAINTIFF HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE PLAINTIFF HAS FAILED TO ESTABLISH THE EXISTENCE OF A "CASE" OR "CONTROVERSY."

Article III of the United States Constitution limits the exercise of judicial power to "cases" and "controversies." A plaintiff seeking declaratory relief must demonstrate the existence of an "actual controversy." 28 U.S.C. §2201. The complaint filed by F.X. Maltz, Ltd. fails to meet these criteria.

The classic definition of "case" or "controversy" was set forth by Mr. Chief Justice Hughes in Aetna Life Insurance Co. v. Haworth et al., 300 U.S. 227, 240-241 (1937):

A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. (citations omitted).

The complaint filed by F.X. Maltz, Ltd. presents a hypothetical situation which is wholly inappropriate for judicial determination. Maltz's complaint is nothing more than "speculation about the future," Boyle v. Landry, 401 U.S. 77, 81 (1971) since Maltz has yet to offer a single nude dance performance, and

its dancers have never been arrested or even threatened with arrest. Moreover, Maltz has made no showing that whatever dancers it hires are likely to be arrested in the future. Maltz's theater is only one among many in New York, and there is no indication that the police will at some future time make arrests on Maltz's premises. Indeed, if as Maltz alleges, its dancers will perform in a non-obscene manner, one would not anticipate their receiving any undue attention from the police department.

The adjudication of a constitutional question must occur "in the context of a specific live grievance." Golden v. Zwickler, 394 U.S. 103, 110 (1969). The nature of the injury Maltz alleges is so conjectural and hypothetical that there is no actual controversy presently before the Court. O'Shea v. Littleton, 414 U.S. 488 (1974). See Rizzo v. Goode, 423 U.S. 362, 372 (1976); Boyle v. Landry, 401 U.S. 77 (1971); Evans v. Lynn, 537 F. 2d 571, 591 (2nd Cir. 1975).

Maltz is challenging the constitutionality of Criminal Procedure Law Section 140.10 as applied.* It is axiomatic that one who challenges a statute "as applied" must present the court with facts sufficient to demonstrate the manner in which the statute

*Although Maltz also alleges that Section 140.10 is unconstitutional on its face, this allegation is clearly frivolous. United States ex rel. Gonzales v. Follette, 397 F. 2d 232 (2nd Cir. 1968); Walter Service Co. v. Redding, 304 U.S. 252, 255 (1938); See e.g. Wong Sun v. United States, 371 U.S. 471, 478 (1963).

is being applied unconstitutionally to his behavior.* However, Maltz has neither pleaded nor offered to prove at trial sufficient facts from which it could be determined whether its naked dancers will perform work of serious artistic merit, such as one would find at Lincoln Center, or merely the old "bump and grind." (Maltz's complaint strongly suggests that the latter possibility is more likely).

The Court cannot decide this issue in the abstract, for not all nude dancing is protected "free speech." Depending on its character, some nude dancing may be entitled to protection. See California v. La Rue, 409 U.S. 109, 118 (1972); Doran v. Salem Inn Inc., 422 U.S. 922, 932 (1975); Salem Inn v. Frank, 522 F. 2d 1045, 1048 (2nd Cir. 1975); Felix v. Young, 536 F. 2d 1126 (6th Cir. 1976). Nude dancing which is obscene is not protected by the First Amendment. See e.g. Marcus v. Search Warrants, 367 U.S. 717, 730-731 (1961).

*Most of the cases cited by Maltz involve statutes challenged as unconstitutional on their face. Defendants concede that in those circumstances, a plaintiff need not always expose himself to actual arrest or prosecution. Maltz apparently believes that Steffel v. Thompson, 415 U.S. 452 (1974) extends this principle to cases where a statute is challenged as applied (See Appellant's Brief, 8-9). However Steffel did not abandon the fundamental requirement that a plaintiff who challenges the constitutionality of a statute as applied must do so within a specific factual context. In Steffel, the petitioner had engaged in precisely the activity (distributing handbills) for which he claimed constitutional protection, and the parties had stipulated as to the probability and nature of the arrest which would occur if the petitioner resumed handbilling. While Atwood v. Purcell, 402 F. Supp. 231 (D. Ariz. 1975) held that police could not arrest naked dancers in mid-performance, the decision was grounded upon the facial invalidity of the Arizona

(footnote continued on next page)

Maltz has consistently taken the position that it need not offer any evidence whatsoever concerning the specific kind of nude dancing which it intends to present. Maltz's complaint is devoid of factual allegations describing in any detail the dances to be performed. That Maltz does not consider such facts important to a determination of this case is apparent from its oral motion for summary judgment, which is unsupported by affidavits, video tape depositions, or any other material which might tend to show that its naked dancers will engage in constitutionally protected activity.

Maltz argues as if it were well-established that all naked dancing automatically enjoys the same degree of First Amendment protection as political speech. Such is not the current state of the law, California v. LaRue, 409 U.S. 109, 118 (1972), as counsel for Maltz discovered when their argument that naked dancers could not be arrested absent prior judicial scrutiny was rejected by two New York trial courts. 206 East 52nd Rest. Corp. v. City of New York, 384 N.Y.S. 2d 654 (Supreme Court, New York County, Special Term, Part I (1976); People v. Morgan, 382 N.Y.S 2d 666 (Crim. Ct. N.Y. City 1976).

(footnote continued from previous page)

obscenity statute, which the Court found to be vague and overbroad. The New York obscenity statute, Penal Law Section 235, was re-drafted to meet the recent standards set forth by the Supreme Court in Miller v. California, 413 U.S. 15 (1973). To the extent that Atwood holds it impermissible to arrest naked dancers in mid-performance even pursuant to a properly drawn obscenity statute, the case is simply wrongly decided.

Whether or not naked dancing constitutes constitutionally protected free speech is an interesting and difficult question. It is obvious that determinations will have to be made on a case by case basis, in the context of specific factual settings. And yet Maltz is asking this Court to determine the issue in the abstract, and to order state trial judges to travel to theaters and view naked dancers before even an arrest can be made. This Court should not render an advisory opinion, granting such drastic relief, on the basis of the bare, conclusory record presented by Maltz in this case.

CONCLUSION

For the reasons set forth above, the decision of the District Court granting defendants' motion to dismiss and denying plaintiff's motion for summary judgment should be affirmed.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(732) 7300

PETER L. ZIMROTH
DAVID RAPAPORT

Assistant District Attorneys

ROBERT M. GROSS

Criminal Law Investigator

Of Counsel

March, 1977

APPENDIX

New York Penal Law Section 235.00, entitled "Obscenity; definition of terms," provides in relevant part as follows:

1. "Obscene." Any material or performance is "obscene" if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. "Material" means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

3. "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

6. "Simulated" means the explicit depiction or description of any of the types of conduct set forth in clause (b) of subdivision one of this section, which creates the appearance of such conduct.

New York Criminal Procedure Law Section 140.10, entitled "Arrest without a warrant ; by police officer; when and where authorized," provides in relevant part as follows:

1. Subject to the provisions of subdivision two, a police officer may arrest a person for:

(a) any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and

(b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.

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CERTIFICATE OF SERVICE

I, DAVID RAPAPORT, attorney for Appellee Morgenthau, hereby certify that I have served the Brief of Appellee Morgenthau upon Appellant F.X. Maltz, Ltd. and upon Appellee Codd by delivering in hand two copies of said brief to Kassner & Detsky, 122 East 42nd Street, New York, New York, attorneys for Appellant F.X. Maltz, Ltd. and to W. Bernard Richland (Leonard Koerner, Of Counsel), 1613 Municipal Building, New York, New York, attorney for Appellee Codd this 24th day of March, 1977.


DAVID RAPAPORT
Assistant District Attorney

